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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 311

S. J. GROVES & SONS COMPANY,
Petitioner,

vs.

THE UNITED STATES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES TO REVIEW A JUDGMENT OF THAT COURT DISMISSING PETITIONER'S SECOND CAUSE OF ACTION.

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SUPREME COURT OF THE UNITED STATES

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vs.

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES TO REVIEW A JUDGMENT OF THAT COURT DISMISSING PETITIONER'S SECOND CAUSE OF ACTION.

Opinion Below

The opinion of the Court of Claims of the United States filed March 4, 1946, rehearing denied June 3, 1946, is in the record (R. 57), and is reported as *S. J. Groves & Sons Company* v. *United States,* 64 Fed. Supp. 472-476.

Jurisdiction

The jurisdiction of this Court for a writ of certiorari to review the judgment dismissing the petitioner's second cause of action and the denial of the Motion for a new trial

and request for amended findings of fact is invoked pursuant to Title 28, Section 288, United States Code, and Rule 41 of this Court.

Statute Involved

There is no statute involved. The issue rests upon the terms of the contract, specifications and elemental principles of fair dealing in public transactions.

Questions Presented

1. Whether there is any legal responsibility on the United States for excess costs, and thus losses sustained by a construction contractor when it is induced to bid and contract for the performance of dam construction work at a high elevation in the Rocky Mountains, at an isolated location, when the length of the working season proves to be less than half as long as represented in the advertised specifications and in the contract itself, prepared in their entirety by the agents of respondent—the result being that it required the petitioner three working seasons to do the work represented as requiring but one and a fraction of another working season?

2. Whether a contractor with the United States may rely upon representations of facts made in the advertised specifications and contracts prepared by representatives of the United States or whether such a contractor may accept their represented correctness only at its peril?

Preliminary Statement

The petition in the court below set forth two causes of action arising out of the same contract. The first cause of action was based upon a determination of fact and allowance made by the head of the department concerned in favor of the contractor. The Comptroller General refused to be

bound by such administrative determination and the petitioner sought relief by mandatory injunction in the courts of the District of Columbia. The petition for certiorari to this Court to review the adverse determination of the lower courts in that case was presented to, and denied by, this Court on June 7, 1943, in *S. J. Groves & Sons Company* v. *Warren*, 319 U. S. 766.

Nearly three years later, or on March 4, 1946, the court below entered judgment for petitioner on this first cause of action. This judgment was on a basis familiar in this Court as to the conclusive effect of the decision of the head of the department concerned on questions committed to his jurisdiction under the terms of the contract. *United States* v. *Mason & Hanger Company*, 260 U. S. 323, affirmed 261 U. S. 610; *United States* v. *Callahan Walker Construction Company*, 317 U. S. 56.

The court below denied judgment on the second cause of action set forth in the petition and this petition is exclusively concerned therewith.

Statement of the Case

(a)

Unsatisfactory findings of fact

The findings of fact by the court below on this cause of action, commencing at page 50 and extending to page 57, are very unsatisfactory from the standpoint of the petitioner.

The facts found by the court below are those reported by its Commissioner, to which both parties had excepted. The petitioner then submitted a motion for a new trial and for amended findings of fact. The court below entered an order on June 3, 1946, denying the same.

Having been unable to get before this Court the record facts, the petitioner has determined to bring the matter here in the belief that sufficient facts have been found by the court below to demonstrate that its opinion and judgment on this second cause of action are both grievously in error. If this Court should so conclude, the case may be remanded with instructions to the trial court.

(b)

There was a misrepresentation of a material fact as to the length of the working season

Petitioner's bid was dated July 31, 1936 (R. 29; F. 2). It submitted tis bid "in August 1936" (R. 52; F. 35), August 7, 1936, to be exact, when it was opened. The contract was not signed by the contracting officer until October 5, 1936 (R. 30; F. 3). The contract was not completed until October 14, 1939 (R. 42; F. 23), *or for a period of 3 years and nine days after the date it was entered into.*

The advertised specifications, made a part of the contract, required the contract work to commence within thirty days after receipt of notice to proceed and to be completed within 450 calendar days from receipt of such notice (R. 51, F. 33). Drawing No. 11, referred to in paragraph 23 of the specifications (R. 51; F. 33) listed 56 items of work to be done, five of the items commencing August 1, 1936, and three as commencing September 1, 1936. Some of the remaining items were listed as commencing April 1, 1937, and all of the work being completed by December 1937 (R. 52; F. 35).

This Drawing No. 11 was the Government's tentative construction program and is described in paragraph 23 of the specifications as follows:

> "A tentative construction program has been prepared by the Government and is shown on the draw-

> ings, which program, if followed, will result in the completion of the work within the period of time specified in paragraph 21. The construction program is based upon an assumption that notice to proceed will be received by the contractor on September 1, 1936. The construction program shown on the drawings is tentative only, and the Government assumes no responsibility for any use that bidders or the contractor may make thereof or for any deductions or conclusions that may be made from the program" (R. 51; F. 33, Par. 23 of specifications).

As the contract was not signed until October 5, 1936, even though the bids had been opened as early as August 7, 1936, it was too late to commence work after October 6th during the remainder of that season.

The notice to proceed was deferred, by reason of the closing down of the winter season about October 6, 1936, to the commencement of the next working season, such notice being given in leter dated June 12, 1937 (R. 51; F. 33, par. 23). This notice to proceed was two months and twelve days later than April 1, 1937, the date shown on the Government's Construction Program when the work could commence (R. 52; F. 35). In itself, this notice shows how wrong the respondent was in representing that work could commence on April 1, 1937.

The contractor had thirty days after the date of receipt of this notice to proceed within which to commence work, as above stated, and the Government construction engineer in charge of the work stated in his letter of April 15, 1937, to his superior officer, quoted in Finding 36 (R. 53), that in ordinary years there was snow on the ground after June 1st and that it was almost a certainty that the borrow pit materials would not be dry enough to be satisfactory before July 15th. The contractor's working program for

1937 followed substantially the Government's Construction Program (R. 53; Finding 36, 2nd paragraph).

Instead of the working season running to December 1, 1937, as represented in the Government's Construction Program, the winter season had so far advanced by September 20, 1937, that a portion of the work had to be shut down for the season and it was all closed down "during October 1937" (R. 54; Finding 37).

Since notice to proceed was given June 12, 1937, the 450 calendar days, stated in the specifications prepared by the respondent, within which to complete the work expired on September 6, 1938, subject to liquidated damages at the rate of $150 for each calendar day of delay thereafter (R. 30; F. 3).

No stop order was issued for the 1937-1938 working season, but the contractor had to suspend work, in part, on September 20th and entirely early in October. To as late as May 13, 1938, the snow was 5 feet, 6 inches deep over the site of the work. The contractor commmenced hauling cement to the dam site on April 26 to 28, 1938, and the roads from Ashton had to be opened by caterpillar equipped snow plows to get to the site (R. 50-51; F 32).

A stop order was issued by the respondent's representative on October 6, 1938 (R. 30; F. 2, 3rd paragraph) but by that time the 450 calendar days, fixed in the specifications for completion of the work, had expired. A recommence order was issued by respondent's representative on June 29, 1939 (R. 30; F. 3, 3rd paragraph). The work was actually completed on October 14, 1939 (R. 31; F. 3, last paragraph). This recommence order of June 29, 1939 is but further evidence as to the incorrectness of the representation that work could commence on April 1st.

(c)

The working season as represented in the respondent's Construction Program corresponded with the length of the working seasons contained in the requirement in the contract specifications that the work had to be done within 450 calendar days from date of receipt of notice to proceed.

The respondent stated in the advertised specifications that the work had to be completed within 450 calendar days from date of receipt of notice to proceed and that it was contemplated that notice to proceed would be given on September 1, 1936 (R. 51; F. 33, Specifications, Pars. 21 and 23), subject to the above mentioned liquidated damage charge of $150 for each calendar day of delay in excess thereof.

Had notice to proceed been then given on September 1, 1936, the 450 calendar days would have expired (allowing 30 days after September 1st within which to commence work) on November 5, 1937.

The respondent's construction program showed five items of work commencing August 1, 1936, and three as commencing September 1, 1936. It also showed some of the other items commencing April 1, 1937, and all as being completed on or before December 1, 1937 (R. 52; F. 35).

The respondent's Construction Program thus showed three items of work commencing even before the date the bids were opened on August 7, 1936, but if the contract had been promptly executed by the contracting officer and notice to proceed had been given on September 1, 1936, as bidders were notified in the specifications it was contemplated to be done, and if the working seasons had run from April 1st to December 1st, as represented in the specifications, the work could have been completed within the required 450 calendar days stated in the advertised

specifications and contract. The basis for this conclusion of fact will be hereinafter more fully stated.

(d)

The working season was in fact approximately half the length represented in the advertised specifications and contract and less than half of the length such working season would have had to be if the work was to be completed within 450 calendar days, with notice to proceed being given in the autumn of 1936.

The notice to proceed was not given until June 12, 1937. It was not given earlier in the year because the respondent's representative on the job knew, as stated in his letter of April 15, 1937, to his superior (R. 54; F. 36, 4th paragraph) that snow was ordinarily on the ground at the dam site on June 1st and that borrow material would not be satisfactory before July 15th. Allowing 30 days after June 12th within which to commence work, it would commence shortly before July 15th, as the construction engineer had contemplated in his said letter of April 15, 1937. It will be noted that after the stop order at the close of the 1938 working season, the recommence order was not given until June 29, 1939.

The petitioner had to cease part of the work on September 20, 1937, and all of it early in October 1937 because of the commencement of the winter season. This left a working season from July 15 to September 20, 1937, or at most from July 12 to October 6, 1937, or less than three months—instead of a working season from April 1, 1937, to December 1, 1937, or eight months, as represented in the respondent's Working Program.

The work not having been completed by September 6, 1938—or within 450 calendar days from the date of the

receipt of the notice of June 12, 1937, to proceed—the respondent's construction engineer closed the work down for the winter season of 1938-1939 on October 6, 1938. He issued his recommence order on June 29, 1938 (R. 30; F. 3, 3rd paragraph). The petitioner was allowed a time extension of 266 calendar days for this shut-down period (R. 30; F. 3, 3rd paragraph) and this time deducted from a calendar year of 365 days, leaves but 99 days, or slightly over 3 months—again less than one-half of the working season from April 1st to December 1st, as represented in the respondent's construction program, and less than half as long a working season than there would have had to be if the work was to be completed within 450 calendar days from date of receipt of notice to proceed.

(e)

The misrepresentation as to the length of the working season at the site was either knowingly made or the respondent is chargeable with notice of the length of the working season at this particular spot.

It is self-evident from the construction engineer's letter of April 15, 1937, who was the contracting officer's representative on the job, that he knew, as a fact, that the length of the working season at the Grassy Lake dam site did not extend from April 1st to December 1st. He was certain that in ordinary years snow remained on the ground on June 1st and that the borrow material for the dam would be too wet to be satisfactory before July 15th. (R. 53; F. 36, 4th paragraph.)

This knowledge, shown by his letter, is confirmed by his giving notice in letter dated June 12, 1937, with the contract allowing 30 days thereafter within which to commence work, and by his letter dated June 29, 1939, to recommence work. It is also confirmed by his letter dated October 6, 1938,

shutting down the work for the 1938-1939 working season because of winter conditions.

The court below, in its Finding 41 (R. 56), has stated that "Stop orders were issued to defer prosecution of the work during the winter season and when operating conditions were unfavorable." This implies that stop orders were issued for all the winter seasons the contractor was on the job, but this is in error. The said court makes no reference to any stop order except the one of October 6, 1938, and to but one recommence order—that of June 29, 1939. None other was in fact issued.

That court's Finding 35 (R. 52) indicates quite clearly that neither the 450 calendar day contract requirement nor the respondent's Construction Program contemplated that any stop orders would be issued during the contract construction period and none was in fact so issued. The stop order of October 6, 1938, and the recommence order of June 29, 1939, were both issued after the contract period of 450 calendar days had expired.

The respondent's representatives are chargeable with notice that the length of the working season at the Grassy Lake dam site was only about 3 months in length and not eight months, as represented in the respondent's working program, and the 8 months it would have had to be in order for the work to be completed within 450 calendar days—with one full winter season intervening between the contemplated commencement order date of September 1, 1936, and the completion date in 1938.

Respondent is chargeable with such notice because the respondent had previously operated a haul road across a part of the dam site from the railhead town of Ashton to the Jackson Lake dam site, near Moran, Wyoming. (R. 50; F. 32, 5th paragraph.) The respondent's representatives could not have used this haul road to transport material

to the Jackson Lake dam site without becoming intimately familiar with the heavy snows, coming early in the autumn and remaining on until after June 1st of each year.

Moreover, the contract, itself, provided for the construction of a dam to a certain capacity and in order to design the dam, the respondent's representatives had to know in advance the approximate quantity of water which would be available each year before they could draw specifications and contract for a dam of any particular capacity.

The court below stated in its Findings (R. 50, F. 32, 4th paragraph), "This small area above the Jackson Lake Dam in the Grassy Lake Drainage area" (proven to be approximately 5 square miles) "furnishes about one-fifth as much water as the remainder of the entire State of Wyoming." Also that Grassy Lake Dam is at an elevation of 7,200 feet above sea level in the rugged Teton Range of Mountains. The prevailing winds at Grassy Lake, on the western side of the Continental Divide, are up-slope so that its location is such that it will receive the maximum precipitation. (R. 50-51; F. 32, 1st paragraph.)

Caretakers maintained by the petitioner at the dam site during the winter season of 1937-1938, reported the snowfall at the dam site each week by telephone to the Ashton office of the respondent's Bureau of Reclamation. These records showed snow from January 1, 1938, to May 13, 1938, measuring 10 feet 8 inches on April 1st to 5 feet and 9 inches on May 13th. (R. 50; F. 32, 2nd paragraph.) In other words, there were 5 feet and 9 inches of snow on the ground on May 12th when the respondent's Construction Program showed the work as commencing almost six weeks earlier on April 1st (R. 52; F. 35). As hereinbefore stated, respondent's construction engineer reported to his superiors that in ordinary years snow was on the ground at Grassy Lake until after June 1st and that dam embank-

ment material would not be dry enough to be satisfactory until July 15th!

(f)

Petitioner relied, and was compelled to rely, upon the respondent's representation that the work could be completed within 450 calendar days, commencing about September 1, 1936, and the respondent's representation that the work could commence at the site of the dam on April 1, 1937, and continue to December 1, 1937.

The advertisement by the respondent's representatives that the work should commence within thirty days after receipt of notice to proceed, tentatively fixed to be issued about September 1, 1936, and be completed within 450 calendar days thereafter, constituted a warranty that a reasonably diligent contractor could perform the work within 450 calendar days with the intervention of one winter season at the altitude of the Grassy Lake Dam.

As hereinbefore stated, the respondent's construction program (Drawing No. 11) showed the working season as commencing April 1st and ending December 1st.

The petitioner did rely, and was compelled to rely, upon this warranty and this representation at the time the bid was submitted in July 1936 and opened early in August 1936.

That the petitioner did rely upon the warranty and representation is established by the Findings of the court below to the effect that before commencement of work, the contractor was required to submit his own working program, and this the petitioner did submit on April 12, 1937. Petitioner's program showed that its 1937 operations had "commencing dates substantially in accord with defendant's tentative schedule, with a contemplated closing date 1 to 1½ months earlier" and that "for 1938 it intended to begin operations about May 15 and to complete the en-

tire work on or before July 14, 1938." (R. 53-54; F. 36, 1st and 2nd paragraphs.)

The petitioner showed in its working program a closing winter date from 1 to 1½ months earlier than December 1st, shown in the respondent's working program, because petitioner's representatives had learned in the autumn of 1936 that the working season did not extend to December 1st. Such representatives had moved some construction equipment onto the job after October 6, 1936, when the contract was signed, and had done some preliminary work in the month of October 1936. It had also hauled sand and gravel to the dam site in 1936, after the contract had been signed (R. 30; F. 3). No order to proceed had been given at that time.

There was no weather bureau station maintained at Grassy Lake (R. 50; F. 32, 1st paragraph). Such other stations in that general locality were at much lower elevations. It apparently was not until petitioner's employees telephoned the daily snowfall to the respondent's Ashton office in the winter of 1937-1938 that it obtained any accurate record of the snowfall at Grassy Lake.

At an elevation of 7,200 feet above sea level and in the rugged mountains, there were no habitations from which petitioner's representatives could obtain information as to the length and severity of the winters at Grassy Lake. The statement in the court's Findings (R. 53; F. 36, 2rd paragraph) that the petitioner's schedule, or work program, was in any degree based upon "inquiry made of ranchers and others residing or working in the vicinity of the Grassy Lake area" is wholly erroneous. Furthermore, the court has itself found that as to the commencement dates in the springs of 1937 and 1938 the petitioner's working program is "substantially in accord with defendant's tentative schedule, with a contemplated closing date of 1

to 1½ months earlier" (R. 53; F. 36, 2nd paragraph). The source of petitioner's information as to the approximate closing date of the working season at Grassy Lake is clear. The fact that petitioner's working program had substantially the same commencement dates as shown in respondent's working program is the best of evidence that petitioner had no information with respect thereto except what it had gained from respondent's representations.

(g)

The petitioner did in fact complete the contract estimated quantities of work, plus the large additions for which the court entered judgment on the first cause of action, within less working time than the respondent represented and warranted there would be during the 450 calendar day period between September 1, 1936 and December 1, 1937.

The tentative Construction Program represented that there would be working time from September 1, 1936, to December 1, 1936, and from April 1, 1937, to December 1, 1937, or for a period of 3 months in 1936 and 8 months in 1937, or a total of 11 months (R. 52; F. 35). If, however, the contractor did not complete the work within 450 calendar days after the receipt of the order on or about September 1, 1937, to proceed, it would have been liable for liquidated damages at the rate of $150 a calendar day for any excess over 450 calendar days which might be used (R. 30; F. 3).

The petitioner received notice to proceed on June 12, 1937, and the contract allowing 30 calendar days to proceed (R. 51), it would have been required to proceed on July 12th. It was required by winter weather to close down much of its operations on September 20, 1937. It thus had 70 days, or 2 months and ten days, within which to work in 1937.

Petitioner could not be expected to commence at an earlier date in 1938 than it did in 1937 and the shut-down order was actually issued on October 6, 1938, though the petitioner had to close its operations a few days earlier. At most, it had but 86 days in 1938, or 2 months and 26 days. Petitioner was not permitted to proceed until June 29, 1939, and it finished the work on October 14, 1939, or after a period of 107 days, or 3 months and 17 days.

Thus petitioner actually had available in the three calendar years of 1937, 1938 and 1939, working time of 8 months and 23 days. Instead of using 11 months within which to complete the work, in accordance with the Government's Construction Program, and the contract requirement of 450 calendar days, it actually used approximately 8 months and 23 days of working time to do all of the contract work, including the vast amount of additional, or extra work, resulting from the unknown subsurface conditions for which the court entered judgment on the first cause of action.

Yet, due to the shortness of the working seasons at the dam site, it required three calendar years for the petitioner to obtain the 8 months and 23 days of working time—as against the 11 months respondent represented would be available from September 1, 1936 to December 1, 1937.

There is thus no basis, even in the lower court's Findings of Fact, for its wholly gratuitous statement that the "proof fails to show that it would have been possible for the plaintiff to perform all of the contract work in two working seasons instead of the three working seasons that were required to do the work" (R. 56; F. 41, last paragraph). On the contrary, the trial court's own Findings of Fact show that petitioner performed all its work in at least two months less working time than the respondent estimated and fixed in the contract—including the large amount of extra work

that the court has found that neither party contemplated at the time the contract was entered into.

Also, there is no basis for the statement that the "proof fails to show that the delays experienced by the plaintiff, as described in the second cause of action, were attributable to the defendant" (R. 57; F. 43).

The so-called delays were delays resulting from the fact that the working seasons at the dam site did not commence until on or about July 15th and that they ended on or about October 1st to 6th each year. The necessity for the three working seasons was not due to any affirmative or negative action of the respondent's officers or employees after the contract was entered into, but it was due to the misrepresentation of the length of the working season. As above shown by mathematical computations, the entire work was completed within approximately 8¾ working months, whereas the Government estimated in its Construction Program and in its requirement that the work be done within 450 calendar days, that it would require some 11 months to do the job.

(h)

There were no delays by petitioner or its subcontractors.

The indisputable fact in support of this conclusion is found in the foregoing summary of the trial court's Findings that all of the work was completed in approximately 8 months and 23 days, whereas the respondent's contract warranty and representation, were that it would take 11 months to do the job.

The trial court was twice requested to make certain specific Findings on this point but this it failed to do. The petitioner is thus handicapped in getting before this Court the exact factual situation in this respect.

However, the contract work was for the construction of a dam embankment of rock, gravel and dirt, across a drainage outlet. So much is stated in the trial court's Finding No. 6 (R. 29-30). This dam was about 1,200 feet long and 120 feet high, the *upstream* slope being covered with a three-foot layer of rock rip-rap. It is inferable therefrom that the drainage outlet was at least 120 feet deep at its deepest part and that through the bottom of this small canyon ran the water from the Grassy Lake drainage area—the water equal to one-fifth of the entire supply of the State of Wyoming (R. 50-51; F. 32, 4th paragraph).

It is further inferable from the meager Findings the trial court did make on this point that through this drainage outlet there had to go the water resulting from the extraordinary heavy snows of 10 feet 8 inches in April to 5 feet 6 inches on May 12th, after such snows had been packed down by snows from about October 1st of each year.

This Court may take judicial notice of the fact that run-offs do not occur until the snow melts in the spring or early summer at high altitudes where winter temperatures are reasonably constant. The construction engineer, representing the respondent on the job, reported to his superior that there were in ordinary years snows on the ground until after June 1st and that dirt, which had to be rolled and packed and thus moist, would not be satisfactory for use until at least July 15th (R. 54; F. 36, last paragraph). Not only did the construction engineer make this official statement, but he backed it up by delaying the issuance of the first proceed order until June 12, 1937, and the recommence order until June 29, 1939, as above stated.

All this means, and can only mean, that through a drainage outlet of 1200 feet at the top and much narrower at the 120 foot bottom, all of this water had to go after the thaws, which were not completed in ordinary years until sometime after June 1st. This could only mean that the water

supply, equal to one-fifth of the water supply of the State of Wyoming, made a raging torrent through the bottom of this canyon for a very considerable period after the thaws actually got under way.

A pipe, made out of concrete poured on the spot, had to be placed in sections through that part of the canyon where the dam was to be placed, and both upstream and downstream where appurtenances for the dam were to be constructed. This concrete pipe is referred to in the Findings as the "Conduit" (R. 27, Schedule items 35, 36, 37, 38, 39 and 40).

It is obvious that the necessary preliminary preparations in the bottom of the canyon to receive the pouring of this concrete pipe and the actual pouring of it could not be done until the run-off after the spring thaws had been completed. The water had to get low enough in the canyon so that men could work in it and machinery could be placed therein. Since it was officially reported by the respondent's construction engineer that snow was on the ground in ordinary years after June 1st, the run-offs were not completed until some time thereafter. The court below failed to determine the approximate date when such run-offs were completed.

Had the work commenced about September 1, 1936, as contemplated at the time bids were requested, submitted and opened—and if the working season in ordinary years had extended to December 1st, as represented in the respondent's Construction Program—this concrete work in the bottom of the canyon could have been substantially completed during the dry autumn months when there would have been no run-off from great melting-snow accumulations of a preceding long winter.

Yet, the contracting officer delayed in executing the contract until October 5, 1936 (R. 10, 29; F. 2). It is inferable from the fact that petitioner had to stop much of its work

on September 20, 1937, and all of it in early October, and that the respondent issued a stop order on October 6, 1938, that winter had commenced about the time the contract was signed. It was then too late to commence concrete operations in that high altitude of 7,200 feet above sea level.

Consequently the concrete operations that should have been done during the low-water season of 1936 had to be done after the run-offs had occurred in 1937, which would be about the latter part of July or August 1st, when the actual pouring of concrete did commence (R. 54-55; F. 39). It was not until the run-off had occurred that the remaining stream of water from Grassy Lake could be diverted to one side or other of the canyon floor. The concrete work was completed by August 15, 1938 (R. 55; F. 39, last paragrapb).

The grouting work, pressure forcing of cement and water which hardens into concrete, in the bottom and walls of the canyon, could not be done until the conduit had been poured and hardened.

The trial court stated in its Findings that the concrete and grouting operations were to start about June 10, 1937, and that the concreting subcontractor did not get to the job site until about June 25th (R. 54). The attention of this Court is invited, however, to the fact that the respondent did not issue its order to proceed until June 12, 1937, and that the petitioner had thirty days after receipt of such order to commence operations. The implication that the petitioner was dilatory in this respect is wholly unwarranted. Furthermore, the run-off from the melting snows was then going through the canyon.

The trial court stated that there were "serious and material delays during the 1937 season, as described above" (R. 55; F. 39) which prevented the earth-moving operations from progressing that season beyond the movement of 30,000 cubic yards of earth into one of the dam abut-

ments, "which should have begun about July 20, 1937. This delay is attributable to the plaintiff" (R. 55; F. 39, 2nd paragraph).

The trial court's statement in these respects is not one of fact, but is a conclusion and the conclusion is disproved by other facts which the court found. The court ignored the fact that concrete operations cannot take place in the bottom of this canyon, or any other canyon for that matter, until the run-off of water has taken place after the spring thaws of snow, sleet and ice. Furthermore, petitioner's working program was based on that prepared by respondent as to the commencement of the working season and the Government's program was in error.

The trial court attempts, so it seems, to create the inference that the concrete work should have commenced even before the notice to proceed had been given or before the thirty days thereafter had expired and while the canyon had much water therein.

Even though the petitioner could not do the bulk of the concrete work in the dry during the fall months of 1936, as was contemplated by the Government's Construction Program and as the necessities of the location required and the grouting work thereafter in 1937, yet the work in its entirety was completed in less than 9 months of working time, whereas according to the court's own findings, the petitioner had approximately 11 months to do the work if the seasons had been as long as they were represented to be; that is, from April 1st to December 1st (R. 52; F. 35).

(i)

The trial court's conclusion, not its findings of fact, are contrary to facts which it did find.

Had the trial court set forth in its Findings the facts establishing that the petitioner was responsible for requir-

ing three calendar years, or at least the working seasons of three calendar years at the dam site to construct this dam, the petitioner would not be here seeking relief. It is at least reasonable to assume that if such facts had been of record in the evidence before the trial court it would have stated them in its Findings rather than its conclusions.

Obviously, the trial court's conclusion that the petitioner was responsible (R. 55; F. 39, 2nd paragraph) is a mere conclusion disproved by facts which that court did find. As the work was unquestionably completed in less than 9 months, while the respondent represented that 11 months would be required, there was in fact no delay. There being no delay, the petitioner is certainly not responsible for delays.

This is in face of the fact that the conduit had to be laid and the grouting had to be done before the dam embankment could be placed across the canyon and over the conduit. It is further in face of the fact that the contracting officer failed from August 7, 1936, when the bids were opened, to October 5, 1936, to execute the contract and thereby prevented the pouring of concrete in the bottom of the canyon during the dry season of 1936, thus compelling the petitioner to wait after June 12, 1937, when notice to proceed was given, until the spring thaws had occurred and the water had run through the canyon.

The physical fact that the working season at the Grassy Lake dam is shown by the commencement and shut-down orders to have been about 3 months in length instead of 8 months, as represented in the Government's Construction Program, cannot be denied. The further fact that the petitioner did complete the work in less than nine months of working time intervening between the date the order to proceed was given—with the contract allowing 30 days thereafter within which to commence work—and the date the

work was actually completed, likewise cannot be denied and is established by the trial court's Finding.

It would be a gross miscarriage of justice to permit the respondent to escape liability for the necessary additional cost on any defense that the petitioner's concrete subcontractor delayed the work.

(j)

The trial court refused and failed to make any Findings of Fact as to the excess costs or damages sustained by the petitioner because of the necessity of having its construction equipment on this job longer than was contemplated by both parties at the time the bid was submitted and the contract executed—due to the misrepresentation of the length of the working season at the dam site.

All of the so-called Findings of Fact by the trial court on this phase of the case is contained in paragraph 42 of its Findings (R. 56). The petitioner is painfully aware of the fact that this Finding is insufficient. The petitioner twice requested the court to make adequate Findings on the basis of undisputed evidence in the record but this the trial court failed and refused to do.[1]

There being no other procedure for review of the judgments of the Court of Claims except in this Court on certiorari or in the Claims Committee of the Congress, this Court must necessarily sit as a Court for the correction of errors in Court of Claims judgments, or else litigants in that Court must be denied justice in some cases—with greatly increased costs to the respondent in future contract matters as contractors seek to protect themselves in future contracts against such injustice as has occurred in this case.

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[1] Insufficient time of not more than 30 minutes was allowed to each side in which to argue this case. Petitioner's counsel was unable to devote more than a few minutes to the argument of this second cause of action.

This so-called Finding in paragraph 42 (R. 56) is not in fact a Finding of Fact with respect to the material last sentence thereof. It is simply a conclusion of the court, without a statement of the facts on which the conclusion is based. The balance of the paragraph is immaterial. Whether the construction equipment was new or rebuilt, or whether the petitioner thereafter sold the equipment and what is secured therefrom has no bearing on the case.

If this Court reaches the conclusion that the trial court erred in its conclusion that the respondent is not legally responsible for the misrepresentation of the length of the working seasons at Grassy Lake and the further conclusion that since the work was completed in less working time than the respondent represented would be required there was in fact no delay, this Court may then remand the case with instructions to the trial court to make specific Findings of Fact—not conclusions—from the record evidence which, we repeat, is undisputed on this point.

This Court followed substantially such procedure in *United States* v. *Brooks-Callaway Company*, 318 U. S. 120, where the respondent here was the petitioner. We request that similiar action be taken in this case.

Specification of Errors To Be Urged

The court below erred in the following respects:

1. In refusing to hold on the second cause of action set forth in the petition that the respondent misrepresented the length of the working season at the dam site to the prejudice of the petitioner and that the respondent is legally responsible for the excess costs or damages resulting to the petitioner by reason of such misrepresentation.

2. In holding, in effect, that the petitioner was responsible for the job requiring three working seasons at the dam site instead of one and a fraction working

seasons, as warranted by the respondent's requirement that the work be done within 450 calendar days from the date of receipt of notice to proceed and as represented by the respondent in Drawing No. 11 that the work could be done from September 1, 1936, to December 1, 1936, and from April 1, 1937 to December 1, 1937.

3. In refusing to make specific Findings of Fact—instead of making conclusions unsupported by facts—with respect to material issues in the second cause of action set forth in the petition.

Reasons for Granting the Writ

1. The judgment of the trial court on this second cause of action to the effect that the respondent did not misrepresent the length of the working seasons at the site of the work and is not legally responsible for such misrepresentation is contrary to the opinions and judgments of this Court in the following cases:

United States v. *Utah, Nevada & California Stage Co.*, 199 U. S. 414;
Hollerbach v. *United States*, 233 U. S. 165;
Christie v. *United States*, 237 U. S. 234;
United States v. *Atlantic Dredging Company*, 253 U. S. 1;
United States v. *Spearin*, 248 U. S. 132;
United States v. *Smith*, 256 U. S. 11;
Freund v. *United States*, 260 U. S. 60.

2. The judgment of the trial court on this second cause of action is contrary to and in conflict with the opinions and judgments of at least two United States Circuit Courts of Appeal, to wit:

Pitt Construction Company v. *City of Alliance, Ohio* (6th), 12 F. (2d) 28;
Grace Company v. *Chesapeake Company* (6th), 281 Fed. 904;
United States v. *Lundstrom* (9th), 139 F. (2d) 792;
United States v. *Johnson* (9th), 153 F. (2d) 846.

3. The opinion and judgment of the court below on the second cause of action set forth in the petition are contrary to and in conflict with other decisions of that court, including:

Sheridan-Kirk Contract Co. v. *United States,* 53 St. Cls. 82;

Virginia Engineering, Inc., v. *United States,* 101 Ct. Cls. 516;

Bein, et al., v. *United States,* 101 Ct. Cls. 144;

Hayes v. *United States,* 103 Ct. Cls. 116, where the plaintiff made misrepresentations inducing the contract under which he was not permitted to recover.

4. The trial court erred in stating its conclusions rather than making Findings of ultimate facts with respect to the alleged delays caused by the petitioner and/or its subcontractors and with respect to the rental charges for the petitioner's equipment while on the job site in excess of two working seasons.

Burr v. *Des Moines R. R. & Navigation Company,* 1 Wall. 102;

Cramp v. *United States,* 239 U. S. 221;

United States v. *Brooks-Callaway Co.,* 318 U. S. 120;

Compare *Florida* v. *United States,* 282 U. S. 194; *United States* v. *C., M. & St. P. R. R.,* 294 U. S. 499.

5. There is involved here a high matter of equity and good conscience on the part of the respondent to its contractors relying upon representations made by the respondent in its advertised specifications and contracts. No possible gain by the respondent in defeating recovery of a just claim will compensate the United States Government for the loss of confidence by contractors in such representations. A republican form of government is based upon confidence by the people in their elected or appointed officialdom.

It is one of the functions of the Judiciary to enforce responsibility for official representations, inducing contracts

with the United States, and this Court has heretofore discharged its responsibility in that respect in the cases cited under reason No. 1 for granting the writ. The lower courts have done likewise, except the Court of Claims in this case.

Respectfully submitted,

O. R. McGuire,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 311

S. J. GROVES & SONS COMPANY,
Petitioner,

vs.

THE UNITED STATES
Respondent

BRIEF IN SUPPORT OF PETITION

The Facts

The petitioner relies upon the facts as summarized in the petition. They will not be restated in this brief except to the extent necessary to point up the legal argument.

ARGUMENT

I

Misrepresentations Were Made as to the Length of the Working Season and Respondent Is Legally Responsible for the Excess Costs, or Damages Sustained by Petitioner by Reason Thereof.

The trial court stated in its opinion that "There was no doubt about the fact that weather conditions made it im-

possible to work as long as defendant's construction program had indicated'' (R. 62).

Not only could the petitioner not work as long as the defendant's construction program indicated; that is to December 1, 1936 and 1937, but the petitioner could not commence work on April 1, 1937, or April 1 of either of the two subsequent years which had been shown as the commencement date in that same defendant's construction program.

We repeat here, from the petition, that the first notice to proceed was not given until June 12, 1936, or two months and 12 days after the date the defendant's program had indicated the work could commence that season. We also repeat that when the respondent stopped the work on October 6, 1938, because of winter conditions, it did not give the recommence order until June 29, 1939.

These orders, issued by such a highly intelligent man as the respondent's construction engineer in charge of this great construction project would have to be, prove beyond doubt that he knew the represented working season from April 1 to December 1 of the calendar year 1937 was in error, and as his letter of April 15, 1937 shows, he knew this long before he issued his order of June 12, 1937 to commence work within the thirty days allowed by the contract therefor.

It is clear that the respondent's representatives knew long before the bids were opened on August 7, 1936 and long before the contract was executed, that the working season was not more than one-half as long as it was represented in the Government's Construction Program to be and not longer than one-half of what it would have had to be to permit the work to be done within 450 calendar days from date of receipt of notice to proceed, as required by the terms of the specifications.

Notwithstanding evidence was before the trial court as to what the contracting officer knew about the matter at the time he executed the contract and notwithstanding there was evidence before the court in the form of photographs made on the site of the work and testimony of the Government Weather Bureau man in charge of the weather stations in Wyoming, the trial court completely ignored such testimony and refused to grant the petitioner's twice repeated request for Findings on the point. Petitioner's counsel is well aware that he cannot summarize that evidence herein for this Court but it has the power and jurisdiction to compel the trial court to either make Findings of Fact on the point or send the record to this Court.

However, the applicable Findings of Fact on the first cause of action, coupled with the meager Findings of Fact on the second cause of action and supplemented by statements of the court in its opinion, are sufficient to establish beyond peradventure of doubt, that:

(1) The working season at the dam site was less than half as long as it was represented in the Government's Construction Program to be and less than half as long as the working seasons would have had to be to enable the work to be done within the contract required period of 450 calendar days.

(2) Including the large amount of extra work for which the trial court entered judgment on the first cause of action, the petitioner completed all of the work within an actual working period of approximately 8 months and 23 days, but it required three calendar years to secure this working season time as compared with the Government represented working time of approximately 11 months from September 1 to December 1, 1936, and from April 1 to December 1, 1937.

(a)

The attempted disclaimer of responsibility for the correctness of the respondent's working program is ineffective for that purpose.

The trial court, in its opinion, quotes in two different places therein (R. 61-62) the terms of paragraph 23 of the advertised specifications, made a part of the subsequent contract, which is also quoted in the trial court's Findings of Fact (R. 51-52). Preceding this paragraph 23 of the specifications is paragraph 21 thereof which notifies all prospective bidders that the work must commence within 30 days after receipt of notice to proceed and be completed within 450 calendar days after receipt of such notice. Paragraph 23 also notifies prospective contractors that the capacity of the contractor's plant, sequence of operations, and methods of operations shall be such as to insure the completion of the work within the time specified. Also, that:

> *"A tentative construction program has been prepared by the Government and is shown on the drawings, which program, if followed, will result in the completion of the work within the period specified in paragraph 21. The construction program is based on the assumption that notice to proceed will be received by the contractor on September 1, 1936.* The construction program shown on the drawings is tentative only, and the Government assumes no responsibility for any use that bidders or the contractor may make thereof or for any deductions or conclusions that may be made from the program. *The tentative construction program is included in the drawings solely to assist bidders and the contractor in preparing their own construction programs."*
>
> (R. 51; F. 33.) (Italics mine.)

There are thus the unequivocal statements contained in this specification (and part of the statement is printed on the drawing itself—R. 52; F. 34) that if the contractor will follow the said construction program, he will complete the work within the time specified in paragraph 21 of the specifications; that is, in 450 calendar days, and that this program was included for the purpose of assisting contractors in preparing their own construction programs.

The first above underscored statement from paragraph 23 of the specifications is an unequivocal warranty that by following the said program the contractor could complete the work within 450 calendar days and in this respect the warranty is one of the same footing and dignity that the preceding warranty is that the work could be completed in 450 calendar days. This positive statement admits of no "use," "deductions," nor "conclusions."

The last above underscored statement from this paragraph of the specifications is a representation that the program is correct—otherwise it could not be of any assistance whatever to the contractor and would be deliberately misleading.

The respondent is welcome to take whichever horn of this dilemma its counsel may decide to take.

The respondent, having operated the road across the Grassy Lake Dam site for several years in connection with the hauling of material from the railhead at Ashton to the Jackson Lake Dam near Moran, Wyoming, could not have been ignorant of the approximate length of the working seasons at the Grassy Lake Dam site. Moreover, having made the necessary surveys and studies to design the Grassy Lake Dam and determine its required capacity, the respondent's representatives were bound to know the approximate precipitation which fell on the Grassy Lake Drainage area in the form of rain, hail and snow. Having all of this in-

formation, the respondent's representatives misrepresented the length of the working seasons in the advertised specifications and induced the petitioner to contract on the basis of working seasons more than twice as long as they actually were at the dam site.

What is more, the respondent's construction engineer in charge of the work knew that in ordinary years the working seasons were less than half as long as the represented working seasons. He deliberately advised his superiors in his letter of April 15, 1937, that there was snow on the ground at the dam site, in ordinary years, at least two months after April 1, 1937, fixed in the respondent's Construction Program as the date to commence work. He did not, in fact, give the commence order until June 12, 1937, or two months and 12 days later than April 1, 1937. At the time he gave the notice he also knew that the contract allowed the contractor 30 days from date of its receipt within which to commence work and he, himself, stated in his above referred to letter to his superior officer that the earth material would not be dry enough in ordinary years to use in the dam until July 15, 1937, or three months and a half after April 1, 1937.

Thus, both on the basis of actual knowledge and on the basis of knowledge chargeable to the respondent, there was a gross misrepresentation as to the commencement date of the work. There was an equally gross misrepresentation as to the approximate closing date of the working season. Instead of December 1st, as represented by respondent, the petitioner had to close down part of the work on September 20, 1937, and all of it early in October; petitioner had to stop work early in 1938 and received a stop order, effective October 6, 1938, after the contract period of 450 calendar days had expired.

The misrepresentation here was as great, and the disclaimer of responsibility is much weaker here than they were in the cases cited in the petition, namely:

United States v. *Utah, Nevada & California Stage Co.*, 199 U. S. 414;
Hollerbach v. *United States*, 233 U. S. 165;
Christie v. *United States*, 237 U. S. 234;
United States v. *Atlantic Dredging Co.*, 253 U. S. 1;
United States v. *Spearin*, 248 U. S. 132;
United States v. *Smith*, 256 U. S. 11;
Freund v. *United States*, 260 U. S. 60;
Pitt Construction Company v. *Alliance*, 12 F. (2d) 28;
United States v. *Lundstrom*, 139 F. (2d) 792;
United States v. *Johnson*, 153 F. (2d) 848;
Virginia Engineering Co. v. *United States*, 101 Ct. Cls. 516;
Bein v. *United States*, 101 U. S. 144.

The breach of the warranty and the misrepresentation in this case are on a par with the misrepresentations in *Hayes* v. *United States*, 103 Ct. Cls. 116. In the latter case the misrepresentations were made by the contractor, which the Court of Claims characterized as "fraud," while in this petition we have a case where the United States representatives did the misrepresenting!

The terms of the specifications, including the Drawing No. 11, being what they are, and the facts being what they are, as above summarized, there is no possible legal basis for the statement in the trial court's opinion that:

> "Defendant made no representations as to the time within which work could be performed in any one year. This, of course, varies from year to year. Defendant would have been foolish to warrant what the weather would be, especially in the locality of exceptionally heavy snows."

Contrary to this statement in the opinion, the trial court's own Findings of Fact (R. 52; F. 35) show that the respondent did represent in Drawing No. 11 that the work could commence on April 1st and continue to December 1st, or for a working season of 8 months. Also, contrary to this statement, paragraph 21 of the advertised and contract specifications stated that the work had to be completed within 450 calendar days, commencing within 30 days after date of notice to proceed (R. 51; F. 33). There being 365 calendar days in a year, this requirement constituted a warranty that the work could be completed in one calendar year and a fraction of another year consisting of 2 months and 25 days. Since the 450 days are stated to be calendar days "from the date of receipt of such notice" to proceed, this means 450 consecutive calendar days, including the winter season or season included therein, particularly in view of the terms of Drawing No. 11. Thus, the representation was that the work could be done in such length of working season as was included within 450 calendar days running consecutively.

While the respondent reserved the right in the specifications to shut down the work, it did not, in fact, shut it down during the contract period. Moreover, the Government's Construction Program, showing the work as commencing August 1st and continuing to December 1, 1936, and recommencing April 1st and continuing to December 1, 1937, did not indicate that any shut-down order would be issued. Since the snow was more than five feet deep at the site of the work as late as May 12, 1937, it is quite obvious that no work could be done during the winter season (R. 50; F. 32, 2nd paragraph).

The Court may take judicial notice of the fact that there are perpetual snows on the higher elevations of certain mountains in the United States. This job was at an elevation of 7,200 feet above sea level, or considerably more than

a mile high. The construction engineer knew the snow conditions at the site of the work in "ordinary years," and stated that there were snows on the ground in such years until after June 1st and that dirt material would not be dry enough to be suitable until about July 15th of such years.

It is an elemental physical and atmospheric fact, to be judicially noticed by the Court, that while temperatures may vary from year to year at low elevations, they remain fairly constant each corresponding season at the higher elevations. This is not only proven by the perpetual snows on higher mountains, such as Mount Rainier, for instance, but is proven by the fact that the opening and closing of the working seasons for the three years of 1937, 1938 and 1939 at the Grassy Lake Dam site were approximately the same, as above summarized with respect to the orders to commence work, the stop order on October 6, 1938, and the dates the petitioner had to cease operations.

It was not a question of "foolishness" in warranting the length of the working season at Grassy Lake, as stated by the trial court. That not only could have been done with approximate accuracy but it was in fact done by the construction engineer in issuing his order to commence work and to resume work and by issuing his one stop-work order. He also indicated with approximate accuracy when work could commence at the site of the work and so advised his superior officer before any work was done at the site commencing in the beginning of the working season.

It was, and is, a question of a mistake being made, and thus a misrepresentation as to the approximate commencement and ending dates of the working season at the dam site.

(b)

The petitioner having completed the work within less than the Government's estimated time required for such completion, the defense to the respondent is not available that the petitioner delayed the work.

This Court is requested to bear in mind in considering this petition for certiorari that the case presented by the petition filed in the trial court and by that court's Findings of Fact is not one for excess costs or damages by reason of being unable to complete the work in less than the contract period, such as was presented in the recent case of *United States* v. *Blair*, 322 U. S. 730.

Nor is this such a case as *United States* v. *Rice*, 317 U. S. 61, wherein the contractor required to coordinate his work with other contractors, was delayed by such other contractors in the performance of his contract and received an extension of time therefor.

This case is based upon misrepresentations in the advertised specifications, made a part of the contract, as to the length of the working seasons at the dam site. The case does not arise under the contract, but arises out of the breach of the representations which induced the entering into of the contract and is within the principles summarized by this court on page 11 of its opinion in *United States* v. *Atlantic Dredging Company*, 253 U. S. 1, and applied in other similar cases cited on page 24 of this petition and on page 33 of this brief.

The petitioner completed the work, in all of its parts, including the large amount of extra work due to unknown subsurface conditions, for which the trial court entered judgment on the first cause of action. The work was completed in approximately 8 months and 23 days of working time as compared with 11 months of working time

which the respondent had allotted for the work in its Construction Program and in its specified period of 450 calendar days within which the work had to be completed.

There is thus no question of any "delay" on the part of anyone in connection with the construction of the dam.

This issue has arisen because it required three working seasons in the three calendar years of 1937, 1938 and 1939 to secure the 8 months and 23 days of working time as against the respondent's representation that 11 months of working time were obtainable from September 1, 1936, to December 1, 1937, and at least 9 months of which working time would have had to be secured during that period to enable the work to be completed within the 450 calendar days fixed and determined by respondent in the specifications advertised for bids.

Basically and fundamentally, the legal principle is the same here as was applied in the *Hollerbach, Atlantic Dredging, Christie, Smith* and other cases above cited, namely, that when the respondent's agents make representations as to conditions under which the work is to be performed and a low bid is induced upon that basis, the conditions must be as represented or the United States must respond in excess costs or damages, which but for the misrepresentations, would have resulted in a higher contract price in the first instance.

If a contractor must dredge hardpan or rock instead of loose sand and gravel, as represented by the respondent's representatives, his bid and contract price will necessarily be higher. This Court has so held.

If a contractor must bid on keeping valuable and expensive equipment on a job for three working seasons, his contract price must necessarily be higher than his price based on keeping the equipment employed under the contract for a lesser period of time. This is due to the loss of

use of his equipment during the third working season and because of the carrying charges on the money invested in heavy and expensive equipment when he cannot rent it or use it himself on other productive work.

The bidders and contractors in the *Atlantic Dredging Company, Hollerbach, Christie,* and other cases above cited, could have examined the site of the work, as they were admonished to do, and could have transported equipment thereto for the purpose of determining the material to be excavated. This Court held in such cases that a positive and unequivocal representation, made to be relied upon and which was relied upon, was sufficient and that the United States could not escape responsibility therefor on the basis of any disclaimer that it did not warrant the represented conditions.

In the case at bar, there was no way for the petitioner's representatives to verify the positive and unequivocal representations that if contractors would follow the respondent's Working Program, they could complete the work within the required 450 calendar days and that said program had been prepared for the purpose of *assisting* the contractors in preparing their working programs.

There was no weather station then at Grassy Lake and there were none nearer than the several towns named in the trial court's Findings, which were each many miles away and at much lower elevations (R. 50; F. 32). The trial court was careful to state in its Findings that the "prevailing winds at Grassy Lake are upslope, so that its location is such to receive the maximum precipitation," but it carefully avoided stating any facts in its Findings which would enable this Court to conclude whether the heavy moisture-laden air from the Pacific was forced upward at the other named places and, thus, lost the moisture there as it condensed on coming into contact with the cold air of the higher elevations and produced an equal or lesser amount of snow.

The trial court made no Findings of Fact on the point, but it is alleged in the petition (R. 6; Par. 1) that the nearest habitations were a dude ranch at roadmarker 11.5 and a fox farm at roadmarker 11, numbered from 1 to 25 from the forest gate up the mountain to the dam site. It is quite clear that the petitioner could not have verified the statements in the respondent's Construction Program that the work could commence April 1st and continue to December 1st, nor the reasonableness of the requirement that the work be done within 450 calendar days from the date of receipt of notice to proceed.

The petitioner alleged in its petition that it was compelled to, and did, rely upon the respondent's representations as to the length of the working season. (R. 8, Par. 6.) This allegation is, in effect, sustained by the Finding of the court that the petitioner's construction program for 1937 "indicates, generally, commencement dates for the various operations substantially in accord with the defendant's tentative schedule, with a contemplated closing date 1 to 1½ months earlier" and that "for 1938 it intended to begin operations about May 15, and to complete the entire work on or before July 14, 1938." (R. 53; F. 36, paragraphs 1 and 2.)

This is the same Construction Program that the respondent's construction engineer sent to his superior officer with letter of April 15, 1937, wherein this officer stated that a study of the said program "reveals that the time of starting some of the items is earlier than climatic conditions will permit;" that in ordinary years there was snow on the ground until after June 1st; that it was almost a certainty that the earth material would not be dry enough to be satisfactory before July 15th; and that he contemplated giving notice on or about June 15th to proceed (R. 54; F. 36, last paragraph).

Thus, three things are plain:

(1) The three working seasons were only about 3 months in length at Grassy Lake, instead of 8 months as represented by the respondent's Construction Program, and that the three seasons were required because the 8 months and 23 days of working time could not be secured at the dam site in less than three calendar years.

(2) That not being able to do the concrete work in the dry in the bottom of the canyon in the autumn of 1936, after the vast amount of water from the thawing snow and ice had run off, the petitioner could make no headway on such work in the 1937 working season until the proceed order had been issued on June 12th, and not even then, until after these spring thaws had run through the canyon. The correctness of this conclusion is proven by the facts that after the concrete work did commence, following the run-off of the water, it was so far completed in 1937 that it was completely finished by August 15, 1938.

(3) There was no delay caused by the concrete subcontractor except that necessarily inherent in the fact that concrete could not be poured and grouting done in the bottom of the canyon in 1937 until after the notice to proceed was given on June 12th and until after the vast amount of water (we repeat, one-fifth of the water of the entire State of Wyoming) had run through this narrow canyon. With the work thereafter rapidly advanced, the water could run through the conduit in the spring of 1938 and the grouting could be done around the conduit and in the walls of the canyon to the extent that the concrete work was completed by Aug. 15, 1938. This explains why so much difficulty was encountered with the attempt to prematurely grout in 1937 and why it was so readily completed in 1938 (R. 52; F. 35). The trial court is entirely in error with respect to its conclusions, as distinguished from Findings of Fact, in this matter.

However, we return to our point that since the work was completed in all of its parts in approximately 8 months and 23 days as compared with the respondent's allowance and estimate of 11 months, there was, in fact, no delay by the concrete subcontractor or others in connection with the work.

Further, this entire difficulty has arisen, and great expense to the petitioner incurred, because of the loss of use of the equipment for the third working season, exclusively due to the shortness of the calendar year working season at Grassy Lake. Even three working seasons at the site furnished less working time than the respondent represented to be available from September 1 to December 1, 1936, and from April 1, 1937, to December 1, 1937.

II

The Amount of the Excess Costs, or Loss, Due to the Loss of the Equipment for an Entire Working Season

The amount of this claim is alleged in the petition to be $70,000 (R. 9, Par. 7). The trial court stated no facts as the basis for its conclusion that petitioner "appears" to have originally based its claim for $70,000 for equipment rental "to include the time from submission of its bid in August 1937 until the end of the 1939 work season. Later it appears to eliminate the 1936 work season from its claim, but makes no change in the amount of $70,000 claimed for equipment rental" (R. 52; F. 35, 2nd paragraph).

If this Court will reverse and remand this case to the Court of Claims with instructions to make Findings of Fact, as it should have done, with respect to this claim for $70,000, it will be found from evidence now in the record before that court that such conclusions are unjustified and unsupported by the record.

It will be obvious to this Court that the petitioner's equipment was required at the dam site for three working seasons aggregating 8 months and 23 days in three calendar years, when the contract was advertised and entered into on the basis of respondent's representations that the work not only could be, but had to be completed in 450 calendar days and that it would be completed from September 1 to December 1, 1936, and from April 1 to December 1, 1937, or 11 months, if the contractor would comply with the respondent's Working Program in Drawing No. 11.

The difficulties of getting the equipment to the site of the work are set forth in paragraph 3 of the second cause of action stated in the petition (R. 7). While evidence in support of such allegations was placed in the record, the trial court made no Findings with respect thereto. It is believed it will be obvious to the Court that the petitioner would not lightly undertake to move the heavier equipment from the dam site until its use was no longer required thereat.

The Court may rightly, and in accordance with its precedents, reverse and remand this case to the Court of Claims for specific Findings of Fact on the issue of the excess costs, or losses, sustained by the petitioner, and to enter judgment accordingly. See Procedure directed in *Freund* v. *United States,* 260 U. S. 60, at page 70, and *United States* v. *Brooks-Callaway Company,* 318 U. S. 120.

III

The Issue in This Case on the Second Cause of Action Is of Great Public Importance

The issue in this case is nothing more nor less than whether contractors and other business men dealing with representatives of the United States may rely upon their representations in advertisements and contracts for work and supplies.

Or whether they must anticipate just what the petitioner has encountered in this case of serious misrepresentations, which greatly injure the contractor, and then be confronted with every possible legal and technical defense in an attempt to escape responsibility therefor—and this notwithstanding that this Court has in numerous instances enforced liability on the respondent for such misrepresentations.

In my *Manual of Procedure under Government Contracts* (1st Ed. 1934, 4th Ed. 1945, F. & D. Company), it was set forth at pages 26 and 27 thereof that prior to 1926 there were many different forms of contracts in use in the Federal service and that I became a member of the Interdepartmental Board of Contracts and Adjustments, whose duty it was to draft the standard Government forms of contracts now in use, a copy of which was used in this case. It was further stated:

> "An effort was made to make these forms as simple as possible and to limit the terms of the contracts to those essential things necessary to include in order to protect the rights of the Government and the contractor. Also, an effort was made not to include in these standard contract forms unnecessary details which had been included in some of the older forms of contracts and which imposed onerous conditions on the contractor unless deemed absolutely necessary for the protection of the public interests. Such effort was not entirely successful.
>
> "These standard forms were submitted to the President and he approved them, as Chief Executive, for uniform and obligatory use throughout the Government service and it will be noted that in the printed directions for the preparation of the contracts (which printed directions are contained on the contract forms below the place for the signatures) all contracting officers are prohibited from making any changes in the printed forms without the prior approval of the Director, Bureau of Budget, obtained through the Interde-

partmental Board of Contracts and Adjustments. This was done in order that no changes be made in the forms without careful prior approval by a disinterested agency of the Government and in order to preserve uniformity in contracting.

"These facts have been mentioned here for a twofold purpose: *First*—to assure the contractor that these contract forms were thoroughly and carefully considered by a group of men who had spent many years in the contracting and purchasing work of the Government. These forms are not agreements that were formulated overnight and which may be as quickly changed. *Second*—to further assure the contractor and his surety that while the various articles, sentences and clauses of the contract forms have been so worded as to meet a particular decision of the courts, too much reliance should not be placed on decisions of the courts considering the different terms and conditions of the old forms of contracts whose use is now prohibited in contracting with the United States."

If the stamp of judicial approval is to be placed on what has occurred in this case, the several years of work of the Interdepartmental Board of Contracts and Adjustments in revising and preparing standard forms of contracts to be used by the United States, so as to insure contractors of fair and just treatment, with resulting lower contract prices for public work, will be defeated, in large part at least.

Conclusion

It is submitted that the application for a writ of certiorari should be granted and that the judgment of the court below dismissing the second cause of action set forth in the petition should be reversed.

Respectfully submitted,

O. R. McGuire,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 311

S. J. GROVES & SONS COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 57–63) is reported in 64 F. Supp. 472.

JURISDICTION

The judgment of the Court of Claims was entered on March 4, 1946 (R. 63). A motion for new trial, filed by petitioner, was overruled on June 3, 1946 (R. 63). The petition for a writ of certiorari was filed on July 18, 1946 (R. 63). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended, 28 U. S. C. 288 (b).

QUESTION PRESENTED

Whether a "tentative construction program * * * shown on the drawings" relating to a standard form Government contract, stated by both the drawings and the specifications to be "tentative only" and "included in the drawings solely to assist bidders and the contractor in preparing their own construction programs," and with reference to which the specifications further stated that "The Government assumes no responsibility for any use that bidders or the contractor may make thereof [the tentative construction program] or for any deductions or conclusions that may be made from the program," constituted a warranty by the Government that performance of the contract could be completed within the time indicated by the tentative program.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract and specifications involved are set out in the Appendix, pp. 16–20.

STATEMENT

On October 5, 1936, petitioner, a Minnesota corporation having its principal office and place of business in Minneapolis, Minnesota, entered into a contract with the United States to furnish materials for and construct the Grassy Lake Dam, Upper Snake River Project, Idaho, at the contract price of $488,477.50 (R. 29). Construction, which was to be in accordance with the specifications, schedules, and drawings made a part of the contract, was to commence within 30 days after receipt of notice to proceed and be completed within 450 calendar days thereafter (R. 29–30, 51). The work was to be performed in rugged mountain country, 7,200 feet above

sea level, at a point where there is heavy snowfall from October to April each year (R. 50).

There was included in the drawings and referred to in the specifications a "tentative construction program" predicated on the assumption that notice to proceed would be received by petitioner on September 1, 1936, a date prior to that on which the contract was entered into, namely, October 5, 1936 (R. 29–30, 51). The specifications stated that the "tentative construction program", if followed, would result in the completion of work within the 450 calendar days specified for completion. The specifications further stated, however:

> The construction program shown on the drawings is tentative only, and the Government assumes no responsibility for any use that bidders or the contractor may make thereof or for any deductions or conclusions that may be made from the program. The tentative construction program is included in the drawings solely to assist bidders and the contractor in preparing their own construction programs. None of the statements in this paragraph nor anything on the tentative construction program shall relieve the contractor from the obligation to commence, prosecute, and complete the work [within 450 calendar days] (R. 51–52).

The drawings also referred to the construction program as "tentative" and repeated that it was "included in the drawings solely to assist bidders and the contractor in preparing a construction program for their use" (R. 52). The "tentative construction

program" indicated that work on certain parts of the project could be started in August and September 1936, that other work could be started on April 1, 1937, and that the entire project could be completed on or before December 1937 (R. 52).

Under a separate contract with the Government petitioner performed some work at the dam site in the Fall of 1936 but, because of the short working season at the dam site, petitioner requested the Government's construction engineer to defer notice to proceed under the contract here involved until the weather became favorable the following spring (R. 30, 54). This was done and, accordingly, notice to proceed was not received by petitioner until June 14, 1937, thereby fixing September 7, 1938, as the date for completion (R. 30, 54).

On April 12, 1937, petitioner submitted to the Government its own anticipated construction program, with the exception of certain items (R. 53). Petitioner's schedule fixed approximately June 10, 1937, as the beginning date for a considerable number of contract items, with October 31, 1937, as the completion date for that season (R. 53). Petitioner's 1937 schedule also indicated that in 1938 it intended to begin operations on or about May 15 and to complete the entire project on or before July 14, 1938 (R. 53). Petitioner's 1937 schedule stated that it was "contingent on weather, temperature and ground conditions" (R. 53). On March 10, 1938, petitioner submitted to the Government its anticipated construction program for that year, indicating that it

contemplated beginning work in June 1938 and that the season would end early in October 1938 (R. 54). Petitioner's 1938 schedule stated that it was "tentative and dependent on weather, temperature, ground and foundation conditions, and is subject to changes and alterations by and for the government and any and all provisions of the general contract pertaining or resulting directly or indirectly" (R. 53). The schedules thus submitted by petitioner were based upon its experience on other projects at or near the Grassy Lake Dam and also upon its investigation and inquiry made of ranchers and others residing or working in the vicinity of the Grassy Lake area (R. 30, 52–53).

The Government issued a stop order on October 6, 1938, deferring prosecution of further work during that winter season (R. 30, 56). The contractor was directed to resume work on June 29, 1939, when weather conditions were again favorable, and a time extension of 266 days was allowed petitioner for this suspension of work (R. 30–31, 56). Three change orders for extra work were also issued and a total of 145 days was added to the contract time for the performance of such work (R. 30–31, 56). Petitioner completed construction, within the contract time as thus extended, on October 14, 1939 (R. 31, 42).

Thereafter, petitioner asserted a claim for $70,000 for additional expenses which it claimed to have incurred during one year's delay allegedly caused by the Government in misrepresenting the length of the working season at the dam site (R. 43). This claim,

which was rejected by the contracting officer (R. 46) and, in turn, by the head of the department (R. 47), forms in part the basis of this suit, brought by petitioner in the Court of Claims on June 30, 1943 (R. 1).[1] The court below held that petitioner was "plainly precluded from asserting" that by the "tentative construction program" included in the draw-

[1] In its amended petition in the Court of Claims, petitioner referred to the claim here involved, for $70,000, as its "second cause of action" (R. 6–9). In petitioner's "first cause of action" it sought judgment for $23,615.70 (R. 6) for excess costs incurred by it due to its having encountered unknown sub-surface conditions in connection with the excavation of certain "borrow pits" (R. 1–6). Petitioner's claim in this amount had been approved by the head of the department but payment had been refused by the Comptroller General (R. 47–50) and the court below awarded judgment to petitioner in that amount (R. 57, 63). There is no question raised in this proceeding with respect to the "first cause of action."

Petitioner's "second cause of action," which is the one here involved, appears to have been based by petitioner, in its amended petition in the Court of Claims, not only on the asserted misrepresentation by the Government with respect to the length of the working season but also on certain delays petitioner claimed to have encountered in connection with the unknown subsurface conditions referred to in the "first cause of action" (R. 8–9). The court below, however, treated the "second cause of action" as relating entirely to the alleged misrepresentations arising from the Government's "tentative construction program." See pp. 3–4, *supra*. Since the petition for a writ of certiorari deals with the "second cause of action" in the same way, it appears that the other basis for the second cause of action, namely, the delays which allegedly resulted from petitioner's having encountered unknown sub-surface conditions, has been abandoned by petitioner.

ings and referred to in the specifications the Government "warranted that work could be performed in the time shown therein" (R. 62), and denied recovery to petitioner. The court found that certain of the delays encountered by petitioner were attributable to petitioner itself and to its own subcontractors (R. 55–56); that "The proof in the case fails to show that the delays experienced by [petitioner], as described in the second cause of action, were attributable" to the Government (R. 57); that performance of extra work under the three change orders which were issued "extended the time for completing all of the contract work one extra working season beyond the time required to complete the original contract work" (R. 56); and that "The proof fails to show that it would have been possible for the [petitioner] to perform all of the contract work in two working seasons instead of the three working seasons that were required to do the work" (R. 56). The court found further that "The record is unsatisfactory to establish any definite amount as rental value for the equipment described for the period of time [petitioner] contends that it was idle" (R. 56–57).

ARGUMENT

The question presented is a narrow one. Briefly, it is whether the "tentative construction program", referred to in the specifications of the instant standard form of Government construction contract as a tentative program only and one for which "the Government assumes no responsibility for any use

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that bidders or the contractor may make thereof" (R. 51; *infra*, p. 20), is what it purports to be or, or whether it constitutes a warranty by the Government that a contractor, by complying with the schedule, will find it possible to complete the project within the time indicated therein. In determining that the specifications and drawings, in describing the "tentative construction program", meant just what they said, the court below was clearly correct.[2]

1. There is nothing in the language of either the contract, the specifications, or the drawings with respect to the "tentative construction program" that could reasonably be interpreted to constitute an enforceable promise by the Government that compliance with the program was possible. Indeed, all the language points the other way. Paragraph 21 of the specifications (R. 51; *infra*, p. 19) bound petitioner to complete the work within 450 calendar days from the date of receipt of the notice to proceed. That was the controlling provision of the contract with respect

[2] Clearly, if the "tentative construction program" did not constitute such a warranty as is claimed by petitioner, there was no liability on the part of the Government with respect to the delays encountered by petitioner, particularly in view of the finding of fact of the court below that the proof failed to show that such delays were attributable to the Government (R. 57). *Crook Co.* v. *United States*, 270 U. S. 4; *United States* v. *Rice*, 317 U. S. 61; cf. *The Howard P. Foley Co., Inc.* v. *United States*, 63 F. Supp. 209 (C. Cls.), pending on writ of certiorari, No. 50, October Term, 1946.

to completion of the work.[3] Paragraph 23 of the specifications (R. 51–52; *infra*, pp. 19–20) required "The capacity of the contractor's construction plant, sequence of operations, and methods of operation [to] be such as to insure the completion of the work within the period of time specified" in Paragraph 21. The "tentative construction program" was referred to in Paragraph 23 as a program which, if followed, would "result in the completion of the work within the period of time specified in paragraph 21." Paragraph 23, however, described the program as "tentative" not once but four times. It specifically stated that "the Government assumes no responsibility for any use that bidders or the contractor may make thereof or for any deductions or conclusions that may be made from the program." It specifically stated that the "tentative construction program" was "included in the drawings solely to assist bidders and the contractor in preparing their own construction programs", which they were required to do under subsequent provisions in the specifications, and that "None of the statements in this paragraph nor anything on the tentative construction program shall relieve the contractor from the obligation to commence, prosecute, and complete the work as provided

[3] As is usual in standard form Government contracts, the contract contained provisions for extension of the time for performance by the Government in the event change orders should be issued, changed conditions should be encountered, or that "delays in the completion of the work" should occur as a result of "unforeseeable causes beyond the control and without the fault or negligence of the contractor" (R. 10–11, 14–15; *infra*, pp. 16–19).

in paragraph 21." And Drawing No. 11, which contained the "tentative construction program" itself, stated that it was tentative and repeated that it was "included in the drawings solely to assist bidders and the contractor in preparing a construction program for their use" (R. 52). In view of this language there clearly was no intention on the part of the Government to promise that completion of the contract was possible within the period shown in the "tentative construction program".[4]

Nor is there any showing that petitioner in fact regarded the "tentative construction program" as anything more than it purported to be. Aside from the language of the specifications and drawings themselves with respect to the "tentative construction program," which we believe were not susceptible of misunderstanding by a contractor who was "neither unsophisticated nor careless" (see *Wells Bros. Co.* v. *United States*, 254 U. S. 83, 87), the record is clear that petitioner based its construction schedule upon its own "experience at or near Grassy Lake Dam, and also upon its investigation and inquiry made of ranchers and others residing or working in the vicinity of the Grassy Lake area" (R. 53, 30, 52) and, in view of petitioner's information thus obtained, regarded even its own schedule as "tentative" and

[4] The nature of the language used in the specifications and the drawings to describe the "tentative construction program" renders inapposite the cases cited by petitioner (Pet. 24–25, 33) as in conflict with the decision below. Cf. *MacArthur Bros. Co.* v. *United States*, 258 U. S. 6.

"contingent on weather, temperature and ground conditions" (R. 53). In addition, it should be noted that it was at petitioner's own request that the "tentative construction program" provided by the Government was varied, at least to the extent of postponing the commencement of operations (R. 30, 54).

Moreover, even assuming that the "tentative construction program" constituted a promise by the Government that completion of performance as shown by the program was possible, petitioner has failed to show that it was in fact prejudiced or damaged in any way by its inability to observe the "tentative construction program." Petitioner's complaint is that it was damaged because the construction work required three working seasons rather than two as contemplated in the "tentative construction program" (Pet. 2; R. 8). But this complaint overlooks the time that was necessary to perform the extra work required under three change orders issued pursuant to the contract (R. 10–11, 30–31, 56; *infra*, pp. 16–17). These change orders gave petitioner 145 days additional time to perform the extra work and, as the court below found:

> Performance of extra work under these three change orders extended the time for completing all of the contract work one extra working season beyond the time required to complete the original contract work.
>
> The proof fails to show that it would have been possible for the plaintiff to perform all of the contract work in two working seasons

> instead of the three working seasons that were required to do the work (R. 56).

Any increased costs incurred by petitioner as a result of the extra working season it was required to work [5] would therefore seem to be chargeable to the change orders and presumably were recognized in contract price adjustments.

2. Petitioner asserts that it has "been unable to get before this Court the record facts" (Pet. 4), apparently because the "findings of fact by the court below * * * are very unsatisfactory from the standpoint of the petitioner" (Pet. 3). Petitioner urges, therefore, that this Court remand the case to the court below for the purpose of making appropriate findings of fact (Pet. 4, 22–23, 42).

It will be observed that petitioner in bringing the record of the case from the Court of Claims to this Court, did not have included therein, as authorized by Section 3 (b) of the Act of February 13, 1925, 43 Stat. 939, as amended, 28 U. S. C. 288 (b),[6] in addition to the findings of fact, "such other parts of the record as are

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[5] It should be noted that the court below specifically found that petitioner failed to prove that it had incurred the increased costs which it claims resulted from its having been required to work a third working season (R. 56–57).

[6] Section 3 (b) of the Act of February 13, 1925, 43 Stat. 939, as amended, 28 U. S. C. 288 (b), provides:

"(b) In any case in the Court of Claims * * * it shall be competent for the Supreme Court upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been

material to the errors assigned." If petitioner believed that the findings of the court below were contrary to the evidence, or that there was "a failure to make any finding of fact on a material issue," it should have included in the record the evidence on which it relied. See also Rule 99 (b), Rules of the Court of Claims, 91 C. Cls. xxviii,[7] and Rule 41, par. 1, Rules of this Court. Having failed to have included in the record the evidence on which it relies, petitioner may not, on the basis of that

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brought there by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment of decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

"The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

"In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

[7] Rule 99 (b) of the Rules of the Court of Claims provides, in part:

"Whenever a certified transcript of the record is requested by the plaintiff or his attorney of record, or by the Assistant Attorney General, for the purpose of filing a petition for a writ of certiorari in the Supreme Court, and the plaintiff or defendant desires not only the pleadings, findings of fact, conclusion of law, judgment and opinion of the Court but also "other parts of the record as are material to the errors assigned," the party making the request for the record shall file with the Court, not more than forty-five (45) days after judgment has been entered, a copy of the petition for

evidence, attack the findings of fact made by the court below.[8]

CONCLUSION

The decision of the court below is clearly correct. There are no conflicts of decision, and the case does not call for review. The petition for a writ of certiorari should, therefore, be denied.

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the writ of certiorari and an original and five (5) copies of such parts of the record as, in his judgment, are material to the errors assigned, and serve upon the opposing counsel a copy of the same at the same time it is filed in the Court.

"Unless the parties can agree as to the parts of the evidence in the record which are material to the errors assigned, then counsel for the party so objecting shall, within ten (10) days from the date of the filing in the Court and service upon him of the above record, file with the Clerk of the Court an original and five (5) copies of such parts of the evidence as he considers should become part of the record to be certified, and at the same time serve upon the appellant's attorney a copy thereof. The Court will then settle the record to be certified. * * *"

[8] If the court below, upon finding that the Government was not responsible for the extra working season petitioner was required to work on the project, had failed to make further findings with respect to the amount of damages, if any, proved by petitioner, then the cases cited by petitioner (Pet. 23, 42), in support of its argument that this case should be remanded to the court below for the purpose of making findings with respect to the amount of such damages, might be pertinent. As it is, however, there is no occasion for such a remand, since the court below, in addition to finding no liability, specifically found no damage (R. 56–57). Thus, the only failure has been that of petitioner to bring before this Court the evidence upon the basis of which it attacks those findings. The cases cited by petitioner in support of its remand argument are, therefore, not in point.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

JOHN F. SONNETT,
Assistant Attorney General.

ABRAHAM J. HARRIS,
EMERY COX, JR.,
Attorneys.

SEPTEMBER 1946.

APPENDIX

I. CONTRACT

ARTICLE 1. * * *

The work shall be commenced and shall be completed as provided in paragraph 21 of the specifications.

* * * * *

ART. 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department of his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in article

15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ART. 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and (or) difference in time resulting from such conditions.

* * * * *

ART. 9. *Delays.—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Govern-

ment for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract), notify the contracting officer in writing of the causes of delay,

who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

II. Specifications

3. *Climatic conditions.*—The contracting officer may order the contractor to suspend any work that may be subject to damage by climatic conditions.

* * * * *

21. *Commencement, prosecution and completion of work.*—The contractor shall begin work within thirty (30) calendar days after date of receipt of notice to proceed, and shall complete all of the work within four hundred and fifty (450) calendar days from the date of receipt of such notice. The contractor shall at all times during the continuance of the contract prosecute the work with such forces and equipment as in the judgment of the contracting officer are sufficient to complete it within the specified period of time.

* * * * *

23. *Construction program.*—The contractor's construction operations shall be at all times subject to the approval of the contracting officer. The capacity of the contractor's construction plant, sequence of operations, and methods of operation shall be such as to insure the completion of the work within the period

of time specified. A tentative construction program has been prepared by the Government and is shown on the drawings, which program, if followed, will result in the completion of the work within the period of time specified in paragraph 21. The construction program is based on an assumption that notice to proceed will be received by the contractor on September 1, 1936. The construction program shown on the drawings is tentative only, and the Government assumes no responsibility for any use that bidders or the contractor may make thereof or for any deductions or conclusions that may be made from the program. The tentative construction program is included in the drawings solely to assist bidders and the contractor in preparing their own construction programs. None of the statements in this paragraph nor anything on the tentative construction program shall relieve the contractor from the obligation to commence, prosecute, and complete the work as provided in paragraph 21. Within sixty (60) calendar days after receipt of notice to proceed, the contractor shall furnish the contracting officer a complete construction program showing in detail his proposed program of operations. Revised construction programs shall be submitted by the contractor at intervals of not more than six months, and in addition thereto the contractor shall immediately advise the contracting officer of any proposed changes in his construction program.

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